BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESSE R. MOORE Claimant	)	
VS.	)	
UNITED CEMENTING-ACID CO., INC. Respondent	)	Docket No. 1,041,890
AND	)	
BITUMINOUS CASUALTY CORP. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 21, 2009, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on February 19, 2010. Dale Slape, of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a 5 percent functional permanent partial impairment. The ALJ found that claimant was entitled to a work disability of 60 percent based on a 100 percent wage loss and a 20 percent task loss. Although respondent, in its submission letter, raised the question of whether claimant's average weekly wage (AWW) should include the cost of his fringe benefits, the Award does not show that the ALJ made a finding on that issue. However, the computation of the Award appears to indicate that the ALJ included the cost of the fringe benefits in calculating claimant's AWW. A review of the calculations also shows that the ALJ used the wrong computation rate and the wrong number of weeks of compensation due in the Award. The maximum compensation rate for a February 19, 2008, date of accident would be $510, and

the number of weeks from February 19, 2008, to the date of the Award, October 21, 2009, would be 87.14, not the 34.86 weeks as shown in the Award.[1]

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that the maximum weekly compensation rate for the date of accident in this case is $510.

ISSUES

Respondent asserts that the ALJ erred in adding the cost of fringe benefits to claimant's AWW, arguing that because claimant was terminated for cause, those benefits were not "discontinued" by respondent within the meaning of K.S.A. 2009 Supp. 44-511(a)(2). Respondent further contends that claimant failed to establish the facts necessary to support an award of work disability. Respondent contends that there is no credible evidence in the record to support a finding that claimant has a task loss. Further, respondent asserts that claimant presented no credible evidence that his wage loss bears any causal connection to his work-related injury.

Claimant argues that the cost of his fringe benefits should be included in his AWW. Respondent's contribution for this additional compensation was terminated, and claimant argues that pursuant to K.S.A. 2009 Supp. 44-511, the value of this additional compensation must be added to his base wage when calculating his AWW. Claimant requests that the ALJ's finding that he is entitled to a work disability be affirmed, as well as the finding that he has a 100 percent wage loss. Claimant, however, argues that the task loss opinion of Dr. Michael Munhall is the more credible opinion and the Board should find he has a 40 percent task loss. In the event the Board agrees with the ALJ that claimant's task loss should be the average between Dr. Munhall's opinion and Dr. Adrian Jackson's opinion, the claimant requests that the Award of the ALJ be affirmed in full.

The issues for the Board's review are:

(1) Should the employer's cost of claimant's fringe benefits be added to his base wage in computing his AWW?

(2) What is the nature and extent of claimant's disability?

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[1]It appears that in his calculations, the ALJ used February 19, 2009, as the date of accident rather than February 19, 2008. Therefore, the number of weeks due and owing was incorrect. The calculation also used a computation rate of $529 rather than the maximum allowed for a date of accident in February 2008 of $510.

FINDINGS OF FACT

Claimant began working for respondent in April 2007 as a driver. On February 19, 2008, claimant was climbing down a stepladder and a coworker was following him down. The coworker was coming down the ladder at a faster speed than claimant, so when he got to the bottom of the ladder, he tried to get out of her way. As he stepped away from the ladder, he fell onto a jack handle and felt immediate pain in his coccyx region. About eight days later, he went to the doctor, and x-rays were taken. On March 17, 2008, he began treatment with Dr. Adrian Jackson, who eventually diagnosed him with coccyx and sacral fractures. Dr. Jackson treated claimant conservatively with physical therapy and pain medication. On June 2, 2008, he found claimant to be at maximum medical improvement and released him with no restrictions.

Claimant returned to work in June 2008, but he was terminated on or about September 2, 2008. Claimant testified that on the Friday before he was terminated, he told his supervisor, Phillip Steinmetz, that he had a doctor's appointment the next Monday.[2] Mr. Steinmetz told him he would put it on the calendar. Claimant's doctor's appointment was for a medical problem that was not related to his injury. He said that when he got out of the doctor's office, he called respondent to let them know he was on his way. He was then told by Mr. Steinmetz that he had not let respondent know about his doctor's appointment, and he was terminated while he was on the telephone. Claimant stated that Mr. Steinmetz denied having a conversation with him the Friday before about his impending doctor's appointment.

Claimant testified that while he was off work for his work-related injury, he was told by a coworker that David Calentine, respondent's owner, planned to get rid of him when he came back to work. Claimant told Jerry Hardin, a human resource consultant hired by claimant's attorney, that he was terminated from respondent because he had sustained an on-the-job injury. Mr. Calentine testified that there was no aspect of claimant's termination that was related to his workers compensation claim and that claimant was terminated for failure to report to work. Mr. Calentine testified that he did not believe he ever made a statement that he would terminate claimant because he had filed a workers compensation claim. Mr. Calentine said that over the weekend before Labor Day 2008, claimant called him at home and asked if respondent was working on Labor Day, and he told him no. Claimant did not mention a doctor's appointment at that time. Mr. Calentine said typically employees will notify the office manager, Trago Buffington, if they have appointments. He said that Ms. Buffington was not notified of claimant's appointment. Mr. Calentine is relying

[2] Claimant testified he thought his doctor's appointment was on a Monday and that he was terminated on Monday, September 1. (R.H. Trans. at 15-16) Later testimony, however, indicates that respondent was closed on Monday, September 1, for the Labor Day holiday and that claimant called respondent claiming to have been at a doctor's appointment on Tuesday, September 2, 2008.

on the credibility of his manager, Mr. Steinmetz, as to whether claimant notified him of his doctor's appointment on September 2.

Claimant said after he was terminated, he started looking for work, and in October 2008, he found a job with Surface Protection Services (SPS). He worked 40 hours a week driving a dump truck and was paid $13 per hour. He was laid off from SPS in November 2008. That was the only job he has had since his termination from respondent.

At the time of the regular hearing, claimant said he could not sit up straight in a chair for long before he had to sit off to one side. Riding in a car was difficult. He had constant pain in his low back right above his tail bone. The pain is in his whole lower half and is worse in the morning. At best, the pain was uncomfortable and annoying. At worst, it hurt badly and he was miserable. He does home exercises to realign his spine and stretch his muscles.

Dr. Adrian Jackson, a board certified orthopedic surgeon, specializes in spine surgery. He originally saw claimant on March 17, 2008, to evaluate him for a sacral or coccygeal injury. He took x-rays, which showed that claimant had a horizontally-oriented sacrum that was not as a result of the injury but was just the way he was born. Dr. Jackson did not see any evidence of fracture or dislocation on the x-rays. His diagnosis at that time was coccydynia, which is pain in the area of the coccyx. He sent claimant for a bone scan and MRI to aid in determining whether there was a fracture that did not appear on the x-rays.

Dr. Jackson next saw claimant on March 26, 2008, at which time he reviewed the results of the bone scan and MRI. The bone scan showed that the tip of claimant's coccyx indicated an increased blood flow in the area, which usually indicates a healing fracture. The MRI showed some edema in the sacrum, which can be an indication of an injury to the bone. At that point, although fractures were not able to be visualized on the studies, Dr. Jackson assumed that claimant had nondisplaced fractures of both the coccyx and the sacrum. Dr. Jackson said the only option for claimant's injuries was to treat him conservatively. His goal was to allow claimant's body to heal and not become too deconditioned in the process. He sent claimant to physical therapy to keep his physical conditioning in line and prescribed pain medication.

Dr. Jackson saw claimant for follow up on May 12. He had been in physical therapy a little over a month. Dr. Jackson put him into another course of therapy with work conditioning for another two weeks. He saw claimant again on June 2 and said that he had made a dramatic improvement from when he had first been seen. Dr. Jackson released claimant from treatment at that time, and he did not place any restrictions on him. His final diagnosis was coccydynia with an assumption claimant had healed coccygeal and sacral fractures.

When Dr. Jackson first saw claimant on March 17, 2008, he gave him restrictions of no repetitive bending or lifting, no crawling, stooping or kneeling, alternate sitting and standing activities each hour, no lifting more than 15 pounds, and no prolonged driving. The restrictions remained until he released claimant from treatment on June 2.

Based on the AMA *Guides*,[3] Dr. Jackson said claimant fell into the diagnosis related estimate (DRE) Category II and rated him as having a 5 percent permanent partial impairment of the whole person. Dr. Jackson opined that claimant would continue to improve over time. He said that typically fractures such as claimant had would improve for a year to 18 months following the injury.

Dr. Jackson reviewed a task list prepared by Steve Benjamin. He opined that claimant would be able to perform all of the activities he did prior to his injury, although he would not be entirely pain-free initially.

Dr. Michael Munhall, who is board certified in physical medicine and rehabilitation, examined claimant on December 29, 2008, at the request of claimant's attorney. After taking a history, reviewing his medical records, and performing a physical examination, Dr. Munhall diagnosed claimant with mid sacral coccyx fractures with lumbosacral spine dysfunction, mid sacral pain, and coccydynia. Claimant's subjective complaints were compatible with the objective findings. When Dr. Munhall performed the examination, claimant was at maximum medical improvement. Dr. Munhall found that there was a causal relationship between claimant's diagnoses and his injury sustained on February 19, 2008.

Using the AMA *Guides*, Dr. Munhall opined that claimant was in DRE Category II which provides a 5 percent whole person permanent partial impairment of function. Dr. Munhall believed that claimant should have permanent restrictions of maximum lift and carry of 30 pounds and push and pull of 60 pounds. He should alternate sitting and standing activities every two hours. Dr. Munhall reviewed the task list prepared by Jerry Hardin. He adopted the analysis prepared by Mr. Hardin with the nos indicating the task would violate his restrictions and the yeses indicating those tasks which claimant could still perform. This would calculate to a 40 percent task loss.

Dr. Munhall admitted that he did not speak with employers or claimant to get information concerning the tasks on Mr. Hardin's list. He also admitted that he did not know, for instance, what was involved in maintaining equipment, what kind of hand or power tools claimant used, or what was involved in safety inspecting a truck. Dr. Munhall testified that he was relying upon Mr. Hardin to accurately describe what claimant was required to do individually.

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Jerry Hardin, a human resource consultant, met with claimant on February 2 and February 5, 2009. Mr. Hardin prepared a list of the tasks claimant performed in the 15-year period before his injury. He said that all the information for the task list came from claimant. At the regular hearing, claimant said he had reviewed Mr. Hardin's task list and deleted one task. Claimant testified that he had not operated a crane in his pre-injury jobs. Mr. Hardin said that even though claimant testified that one task, operating an overhead crane, was one that he did not perform, the percentage of task loss testified to by Dr. Munhall would be the same because of the large number of tasks. In the 15 years before his injury, claimant worked at 48 jobs and had 385 tasks, so just changing one task would not be enough to change the overall percentage of loss.

Mr. Hardin said that claimant was not working at the time of his interviews and had a 100 percent wage loss. However, he opined that using the restrictions imposed on claimant by Dr. Munhall, his ability to earn a comparable wage has been reduced because of his injury. Although claimant has fewer positions available to him, he is able to earn approximately $400 per week in those fewer position. Claimant told him that he had worked for SPS from October 2, 2008, until November 10, 2008, when he was laid off. He had no other jobs after that. Mr. Hardin and claimant had no discussion about his job search.

Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant on August 3, August 5, and August 11, 2009, at the request of respondent. Together they prepared a list of tasks claimant performed in the 15 year period before his accident. There were 132 separate work tasks on the list.

Claimant was unemployed at the time he and Mr. Benjamin met. But Mr. Benjamin believed that claimant could earn $456.08 per week considering Dr. Munhall's restrictions. In reference to Dr. Jackson's opinion that claimant has no restrictions, Mr. Benjamin said claimant would be able to go back to his time-of-injury position or a similar job and would have no wage loss.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-511(b) states in part:

> The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> (1) If at the time of the accident the money rate is fixed by the year, the average gross weekly wage shall be the yearly rate so fixed divided by 52, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime as computed in paragraph (4) of this subsection.

K.S.A. 2009 Supp. 44-511(a)(2) defines "additional compensation" to include "employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Kansas Supreme Court recently stated in *Bergstrom*:[4]

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read

[4] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶¶ 1, 3, 214 P.3d 676 (2009).

> the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> . . . .
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

ANALYSIS

In the absence of *Bergstrom*, claimant's efforts to find other employment and the reasons why claimant is no longer working for respondent would have been issues to consider in determining whether claimant's actual post-injury wages or his wage-earning ability should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes it clear that good faith is not an element of the permanent partial general disability formula and that actual post-injury earnings must be used in computing claimant's permanent partial general disability. In effect, *Bergstrom* clarifies that it is of no concern why a worker is earning less than 90 percent of his or her pre-injury AWW because the unambiguous language of K.S.A. 44-510e requires a comparison between the worker's actual pre- and post-injury earnings. Hence, *Bergstrom* stands for the proposition that we should follow the specific, unambiguous language of K.S.A. 44-510e rather than carving out exceptions to using actual wage loss on the basis of what may or may not be more equitable. The same analysis applies to the issue of claimant's gross AWW. The reasons why claimant is no longer working for respondent and, thus, why he is no longer receiving the fringe benefits provided by respondent are not relevant. What is relevant is whether those benefits constituted additional compensation under K.S.A. 2009 Supp. 44-511(a)(2) and whether they were discontinued. The Board finds that the ALJ was correct to include the value of the employer's contribution to the cost of claimant's health insurance to claimant's pre-injury AWW.[5]

With regard to claimant's task loss, the ALJ gave weight to the opinions of both Dr. Jackson and Dr. Munhall. He found that claimant was in need of permanent work restrictions, but his loss of ability to perform the job tasks he had performed in the 15 years before his accident fell somewhere between the 0 percent opined by Dr. Jackson and the 40 percent opined by Dr. Munhall. The Board agrees with the ALJ's analysis and finds claimant's task loss from this injury is 20 percent.

Claimant's 12.71 weeks of temporary total disability benefits presumably ended on or about June 2, 2008, when he was found to be at maximum medical improvement.

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[5] The date claimant's fringe benefits ended is not in the record but presumably was the date he was terminated, September 2, 2008.

Claimant returned to work for respondent in June 2008[6], and he earned 90 percent or more of his pre-injury AWW until he was terminated on or about September 2, 2008. Therefore, during this period, claimant's permanent partial disability was limited to his 5 percent functional impairment. For the period after that date, claimant had a 100 percent wage loss until he began working for SPS on October 2, 2008. According to claimant, he earned about $520 per week for the several weeks he worked for SPS during October to November 10, 2008. Hence, claimant had a 37 percent wage loss. As this is less than 90 percent of the pre-injury AWW of $822.08, claimant is entitled to a work disability. Following his lay-off from SPS in November 2008, claimant had another 100 percent wage loss, as he was no longer working.

In summary, claimant has the following post-injury wage loss for the following periods:

> From June 3, 2008, through September 2, 2008, claimant had no wage loss; from September 3, 2008, through October 1, 2008, claimant had a 100 percent wage loss; from October 2, 2008, through November 10, 2008, claimant has a 37 percent wage loss; and thereafter claimant has a 100 percent wage loss.

Averaging claimant's various post-injury wage loss percentages with his 20 percent task loss yields the following permanent partial general disability percentages for the following periods:

> From September 3, 2008, through October 1, 2008, claimant's work disability is 60 percent (100 percent wage loss and 20 percent task loss); from October 2, 2008, through November 10, 2008, claimant's work disability is 28.5 percent (37 percent wage loss and 20 percent task loss); from November 11, 2008, forward, claimant's work disability is 60 percent (100 percent wage loss and 20 percent task loss).

Because the wage loss portion of the work disability formula changes several times as claimant's wage loss changed, the percentage of work disability varies. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award; thereafter, the number of weeks is reduced by the prior permanent partial disability weeks already paid or due.

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[6] The exact date in June that claimant returned to work is unknown. For purposes of this Order, the Board will use the date of June 3, 2008.

But the amount of benefit does not change whether the benefits are for work disability or functional impairment; instead when the injured worker's status changes due to changes in the work disability percentage or from functional impairment to work disability, the only change under the current statute is the length of time the employee is entitled to receive benefits. As noted, claimant's work disability changes several times, but due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

CONCLUSION

(1) The employer's cost of claimant's additional compensation (health insurance premium) shall be added to claimant's base wage in computing his AWW.

(2) Claimant's permanent impairment of function is 5 percent, his task loss is 20 percent, and his final wage loss is 100 percent, making his permanent partial (work) disability 60 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 21, 2009, is modified to correct the compensation rate from $529 to $510 per week, but is otherwise affirmed.

Claimant is entitled to 12.71 weeks of temporary total disability compensation at the rate of $510 per week or $6,482.10, followed by permanent partial disability compensation at the rate of $510 per week not to exceed $100,000 for a 60 percent work disability.

As of March 12, 2010, there would be due and owing to claimant 12.71 weeks of temporary total disability compensation at the rate of $510 per week in the sum of $6,482.10, plus 94.72 weeks of permanent partial disability compensation at the rate of $510 per week in the sum of $48,307.20, for a total due and owing of $54,789.30, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $45,210.70 shall be paid at the rate of $510 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Dale Slape, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge